IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FARAD CONTINUATION SHEET

SECOND APPEAL NO.640 OF 2003

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Office Notes,Office memorandum of Coram, appearances,Court's orders or directions & Registrar's orders.

Court's or Judge's orders

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CORAM: A.S.OKA, J.

DATED: AUGUST 25, 2004.

P.C.:

1. Heard Shri Thokade for the Appellants and Shri Godbole for the Respondent. The Appeal is filed by the original Defendants against whom Decree for possession is passed in the suit filed by the Respondent. The case of the Respondent is that the Appellants have encroached upon the suit property. The defence of the Appellants was that they have perfected their title by adverse possession. The finding recorded by the Courts below is that the Respondent has established his title in respect of the suit property and the Appellants have failed to establish

their plea of perfection of title by adverse possession.

2. The learned Counsel appearing for the Appellants Shri Thokade submitted that an Application was made at Exh.40 in the Trial Court for amendment of written statement of the Appellants. The contention which was sought to be raised by making the Application for amendment that that there was an error in consolidation scheme under the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 and if the said error is rectified the Appellants will be entitled to ownership in respect of the suit property. It was sought to be pointed out by the proposed amendment that an Appeal has been preferred by the Appellants before the Deputy Director of Land Records, Pune for challenging the order passed in the Consolidation Scheme. The learned Counsel for the Appellants submitted that the said Application was erroneously rejected by the Trial Court and in the Memorandum of Appeal filed in the District Court by the Appellants

against the Decree passed by the Trial court there was a challenge to the order passed by the Trial Court below Application at Exh.40. He submitted that in view of Section 36-A of the said Act of 1947 the proceedings of the suit ought to have been stayed. He submitted that the Appeal which was preferred by the Appellants before the Deputy Director,Pune has been dismissed and a Revision Application filed by Appellants against the said order is pending before the State Government. He submitted that in case the Appellants succeed in the said Revision, record of the consolidation Scheme will be corrected and the Appellants will be entitled to claim ownership in respect of the suit property.

3. I have considered the rival submissions. In so far as challenge to the order below Application Exh.40 is concerned, from the Judgment of the Appellate Court it appears that the said point was not argued before the Appellate Court. Therefore, the challenge to the order passed below Exh.40 cannot be

agitated in the Second Appeal.

4. As the position stands today, the Appellants have no title in respect of the suit property and after considering the evidence on record their plea of adverse possession has been negatived by the Courts below. So far as the findings recorded by the Courts below on the said plea are concerned, I find that the same are neither perverse nor illegal.

5. Therefore, there is no reason to interfere with the Decree passed by the Trial Court for removal of encroachment. In so far as the said decree is concerned, the same has nothing to do with the proceedings which are pending in the form of Revision filed by the Appellants before the State Government. If the said Revision is allowed, it will have its own legal consequences arising out of the said Act of 1947.

6. In the circumstances, there is no merit in the Second Appeal and same is dismissed with no order as to costs. It

is made clear that notwithstanding with the dismissal of the Second Appeal, the Revision Application preferred by the Appellants will be decided on its own merit by the concerned Authority.

7. At this stage, Shri Thokade learned Counsel appearing for the Appellants prays that stay may be granted to the Decree for possession as the Revision Application is likely to be decided in the near future. The said request is opposed by Shri Godbole the learned Counsel appearing for the Respondent.

8. Considering the facts and circumstances of the case, decree for possession shall not be executed till 31st January 2005 subject to the condition that the Appellants will not create any third party interests in respect of the suit property and will not change the nature of the suit property and will not part with possession in respect of the suit property in favour of any third party. An undertaking in writing to that effect shall be filed by the Appellants in this

Court within two weeks from today. If undertaking is not filed within the stipulated period, the stay granted shall automatically stand vacated.

9. Parties to act upon an ordinary copy of the order duly authenticated by the Court Sheristedar.

Judge.